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**Before the
FEDERAL COMMUNICATIONS COMMISSION DOCKET FILE COPY ORIGINAL
Washington, D.C. 20554**

In the Matter of)
)
Petition for Rulemaking to Amend)
Eligibility Requirements in Part 78)
Regarding 12 GHz Cable Television)
Relay Services)

CS Docket No. 99-250

RM No. 9257

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REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

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REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc., and its affiliates ("RCN"), by its undersigned counsel and pursuant to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM"), respectfully submits these Reply Comments in the above-captioned proceeding.¹ In this proceeding the Commission's aim is to determine whether multichannel video program delivery ("MVPD") operators, including private cable operators ("PCOs") and open video system ("OVS") operators, should be made eligible to apply for licenses in the Cable Television Relay Service ("CARS"), which operates in the 12 GHz band. In the NPRM the Commission solicited comments on the impact that PCOs and OVS operators would have on current users of 12 GHz channels. In the Comments filed in response to the NPRM, several parties raised concerns regarding congestion on the 12 GHz band and regarding spectrum allocation in the 12 GHz and 18

¹ *Petition for Rulemaking to Amend Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Services*, RM 99-9257, Notice of Proposed Rulemaking, FCC 99-166, -- FCC Rcd -- (rel. July 14, 1999) ("NPRM").

GHz bands generally.² As discussed below, RCN believes that these concerns do not rise to a level that warrants the continued exclusion of PCOs and OVS providers from the 12 GHz band.³

I. Concerns About Congestion on the 12 GHz Band Do Not Outweigh the Benefits of Granting Access to PCOs and OVS Operators

The main purpose of this proceeding is to facilitate the development of competition in the MVPD market by investigating whether to grant PCOs and OVS providers access to CARS licenses on terms equal to the other MPVDs that currently have access to these licenses.⁴ RCN maintains, as it has throughout this proceeding, that granting PCOs and OVS operators access to the 12 GHz band would promote competition by providing them with the same degree of flexibility in engineering their systems that their competitors currently enjoy. This idea is captured by the principle adopted by the Commission in this proceeding that "use of the microwave radio spectrum should be governed by type of use rather than type of licensee."⁵ Throughout this proceeding RCN has endeavored to demonstrate how providing access to the 12 GHz band would promote flexibility in system design and thereby achieve pro-competitive results.⁶

Several broadcast concerns filed comments expressing their fear that granting PCOs access to the 12 GHz band would adversely affect broadcast production operations by increasing congestion

² See Comments of Society of Broadcast Engineers at 1-2 ("SBE"); Comments of National Association of Broadcasters at 4 ("NAB"); Comments of KaStar Satellite Communications at 4 ("KaStar"); Comments of the Walt Disney Company at 2 ("ABC").

³ The Comments also contained a number of arguments that are either frivolous or irrelevant. RCN will not endeavor to address each of these arguments in its Reply Comments.

⁴ See NPRM at ¶ 4.

⁵ *Id.* at ¶ 13 (quoting *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, Gen Docket No. 90-54, Report and Order, 5 FCC Rcd 6410, 6423 (1990)).

⁶ See Comments of RCN In Support of Petition for Rulemaking at 2-7; Comments of RCN at 4-8. RCN notes that while some of its discussion in the past has used specific networks operated by RCN for purposes of illustration, RCN views the issue of access to the 12 GHz band as important for its future network development in potentially all of its markets. See Comments of RCN In Support of Petition for Rulemaking at 3; Supplemental Comments of RCN in RM 9257 at 3.

on the channels co-shared with the broadcast auxiliary service ("BAS").⁷ The broadcasters were especially concerned that increased congestion on the 12 GHz band would hamstring the production of live HDTV broadcasts from sporting and news events.⁸ This concern seems to be based upon the assumption that PCOs will be operating point-to-multipoint facilities over the entire 12 GHz band in such a manner as to preclude BAS use of the 12 GHz band over wide areas.⁹

RCN submits that the concerns of these parties are overstated and do not warrant excluding PCOs and OVS operators from the 12 GHz band. By their own count, broadcasters currently have at least four frequency bands available for use as remote production or transmission facilities.¹⁰ This provides them with a significant number of options for engineering solutions for their communications needs in any given environment. PCOs and OVS operators, in contrast, currently have no option but use the 18 GHz band,¹¹ and that option is likely to be greatly limited by Commission in its Fixed Satellite Service proceeding ("*FSS Proceeding*").¹² As the Commission stated in the FSS Proceeding, "there is simply no other spectrum available at this time in the 18 GHz band, or in any other band, - - even on an interim basis - - to adequately accommodate either new

⁷ Comments of SBE at 1-2; Comments of ABC at 1; Comments of NAB at 4.

⁸ Comments of ABC at 2; SBE at 2.

⁹ See Comments of NAB at 7.

¹⁰ Comments of SBE at 2. This count omits the 18 GHz band which is open to BAS use under 47 C.F.R. § 74.602(a). It is telling that the frequency band to which the broadcasters would relegate PCOs is deemed unfit for their own use. See Comments of NAB at 4.

¹¹ As stated in its comments, RCN does not consider the 23 GHz band to be a viable alternative for its point-to-point microwave needs. Comments of RCN at 1; see also Comments of Comsearch at 2-3.

¹² See *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite Service use*, IB Docket No. 98-172, Notice of Proposed Rulemaking, FCC 98-235 (rel. Sept. 18, 1998) ("*FSS NPRM*"); NPRM at ¶ 21; see also Comments of NAB at 4; See Comments of KaStar at 4-5.

PCO operations or existing operations seeking to expand " if access to the 18 GHz band is restricted.¹³

In the FSS Proceeding the Commission proposed to reallocate much of the 18 GHz band for FSS.¹⁴ Under the proposed allocation and channelization plan, PCOs are likely to lose access to much of the 18 GHz band and will find it increasingly difficult to find spectrum suitable for their needs in the portions that remain available for their use.¹⁵ Furthermore, PCOs are already excluded from the 18 GHz band in Denver and Washington D.C.¹⁶ These are important markets for RCN and these exclusions greatly restrict RCN's ability to design the most cost effective network for its systems in these markets.¹⁷

Accordingly, RCN believes that the concerns raised by the broadcasters, that their use of the 12 GHz band will be restricted if they are required to share one of their microwave bands with more users, is outweighed by the PCO's concern that they are in danger of losing access to the microwave spectrum for future broadband use. As a result, the impact on PCOs from not gaining access to the 12 GHz band is very likely to be greater than the impact on broadcasters for having to share that band with additional users.

¹³ *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite Service use*, IB Docket No. 98-172, Order, 14 FCC Rcd 3086, ¶ 11 (rel. Feb. 10, 1999) (extending the cut-off date for PCO applications to operate on a primary basis in the 18 GHz band) ("*FSS Application Cut-off Order*").

¹⁴ *See FSS NPRM* at ¶ 30.

¹⁵ *See FSS Application Cut-Off Order* at ¶¶ 4, 10.

¹⁶ *Amendment to the Commission's Rules to Relocate the Digital Electronic Message Service*, ET Docket No. 97-99, Order, 13 FCC Rcd 3581 (1997).

¹⁷ RCN is a certified OVS provider in Washington D.C. *Starpower Communications, LLC Certification to Operate an Open Video System*, DA 98-138, Memorandum Opinion and Order, 13 FCC Rcd 2169 (rel. January 26, 1998).

II. Cost Effectiveness of the 12 GHz Band

Several commenters raised issues relating to the costs associated with the construction of PCO and OVS systems. First, several commenters raised the issue of the cost of alternative MVPD systems, with Time Warner suggesting that there was no data indicating that alternatives were less cost effective, and SBE arguing that cost was irrelevant.¹⁸ With regards to the cost effectiveness of alternatives to the 18 GHz spectrum, RCN submits that it is well established that fiber is cost effective only when serving a large number of customers.¹⁹ RCN has adopted a strategy of using microwave networks, where available, as a market-entry strategy until it has a sufficient customer base to justify the cost of constructing a proprietary fiber network. Similarly, as RCN expands into outlying areas, it uses microwave paths until the cost of installing fiber is justified by increased subscribership.

Furthermore, the mere fact that fiber and the 23 GHz band are available for PCO use should not be considered absent consideration of the relative costs of these alternatives. The entire purpose of this proceeding is, in the end, to stimulate competition in the MVPD market by making market access easier for potential competitors. As RCN discussed in its Comments, 12 GHz microwave networks are more cost effective because, as a simple matter of geometry, they require less equipment to provide service to a given area.²⁰ In particular, it would cost approximately \$95,000 to install a single 12 GHz path. To cover the same distance, it would cost approximately \$163,000 to install a three hop 18 GHz path.²¹ For 18 GHz, RCN would also be required to pay an additional

¹⁸ Comments of Time Warner at 15; Comments of SBE at 4-5.

¹⁹ See National Telecommunications and Information Administration, U.S. Department of Commerce, *U.S. National Spectrum Requirements: Projections and Trends*, Chapt. 2, table 2-1 (1995), <http://www.ntia.doc.gov/openness/sp_rqmnts/contents.html> ("*NTIA Report*") (Construction cost per DS3 link for a three hop microwave system is \$1,890,000 vs. \$4,410,000 for a fiber network of equal length). In its initial Comments RCN unintentionally omitted the final "l" in the web address for this document.

²⁰ Comments of RCN at 8.

²¹ The cost of installing a three hop 18 GHz path is less than three times the cost of a one hop 12 GHz path because 18 GHz equipment is less expensive than 12 GHz equipment. Nevertheless, an 18 GHz system is more expensive than a 12 GHz system because of the additional

\$2,000 to \$4,000 per month for site leases for the additional hops. Because the transmission distance for 23 GHz is even shorter than the transmission distance for 18 GHz, the cost at 23 GHz has the potential to be even higher if additional hops are needed. Thus, RCN believes that cost is an important factor weighing in favor of granting PCOs and OVD providers access to the 12 GHz band.

III. Additional Issues

In the NPRM, the Commission invited comment on the effect granting PCOs access to the 12 GHz bands would have on incumbents.²² The Commission was particularly interested in the potential effects on congestion and on the ability of incumbent cable companies to provide service to all portions of their service areas.²³ In its comments, Time Warner, the only incumbent cable operator to participate in this proceeding, does not argue that allowing PCOs to use the 12 GHz band will have any adverse impact on their current or future use of the 12 GHz band. Instead, Time Warner makes a number of arguments that are more focused on the competitive effects of allowing PCOs to use 12 GHz frequencies. For example, Time Warner argues that granting PCOs access to the 12 GHz spectrum will conflict with its ability to serve the entire community by permitting PCOs to serve MDUs in high density areas.²⁴ It does not argue that the PCO 12 GHz systems will interfere with its own systems or will prohibit it from establishing its own microwave networks. Rather, Time Warner essentially argues that PCOs should not be granted access to the 12 GHz band because it would allow the PCO to serve MDUs in the ICOs' service area.²⁵ However, this is the very purpose

equipment and site leases needed for the additional hops.

²² NPRM at ¶ 11.

²³ NPRM at ¶¶ 11, 16.

²⁴ Comments of Time Warner at iii, 6, 8. This also appears at Time Warner's point in its arguments regarding the purpose of the different regulatory treatment of SMATV systems. *Id* at 3.

²⁵ See, e.g., Comments of Time Warner at 7-8. Incidentally, Time Warner's conclusions based upon RCN's growth in revenues are dubious, at best. While RCN is experiencing revenue growth due to its continuing network build-out, a comparison with the consolidated revenues of Time Warner Entertainment, which was \$12.2 billion dollars in 1998, reveals that Time Warner's revenues are two orders of magnitude larger than RCN's. Securities and Exchange Commission Form 10-K of Time Warner Entertainment p. 93 (filed March 30, 1999). Furthermore, Time Warner's customer base is correspondingly large with, for

of this proceeding, and Time Warner's argument appears to be that PCOs should not be granted access to the 12 GHz because it would be pro-competitive. While the conclusion that granting access to the 12 GHz spectrum would promote competition is correct, RCN submits that this is a reason to grant the PCOs access to the 12 GHz band, not deny access.

Time Warner also contends that the PCOs should only receive the "benefit" of obtaining access to the 12 GHz band in exchange for being subjected to a laundry list of additional regulations.²⁶ This argument is unpersuasive for a number of reasons. First, many PCOs, including RCN, also operate regulated cable and OVS systems and are therefore subject to regulatory requirements in those markets, including must-carry.²⁷ Additionally, there are other classes of users already eligible to use the 12 GHz band which are not subject to the same regulatory burdens as cable operators, namely the MDS, MMDS, ITFS and BAS users. Thus, the regulatory burdens advocated by Time Warner have not in the past been considered a prerequisite for gaining access to the 12 GHz band.

Furthermore, there is no reason to regulate fledgling PCOs and OVS operators on parity with entrenched incumbent cable operators that possess overwhelming market power. Each of the regulatory provisions applicable to incumbents and discussed by Time Warner were promulgated through full rulemaking proceedings and were carefully tailored to effectuate specific regulatory goals. In the context of this current proceeding, the degree to which PCOs and OVS operators are subject to these various regulations is irrelevant because it does not impact the physical operations of incumbent licensees in the 12 GHz band. The over-arching regulatory status of PCOs is simply beyond the scope of this proceeding.²⁸

example, 1.3 million subscribers in Manhattan, as compared with RCN's 50 thousand. Thus, the competitive position of the PCO's in the face of goliaths such as Time Warner remains quite challenging.

²⁶ Comments of Time Warner at i, 2-8.

²⁷ See 47 U.S.C. § 573(b).

²⁸ In a similar vein, Time Warner also argues that PCOs should be subject to must-carry obligations in the same manner as DBS operators would be pursuant to legislation pending in Congress. Comments of Time Warner at 9-10. First, because this legislation is not yet law, any comparisons are of

In its Comments Time Warner employs standards that simply do not apply in the context of a rulemaking proceeding. For example, Time Warner argues that the proponents of Optel's proposal "bear the burden of proving that . . . interference would not occur."²⁹ This burden does not exist in the rulemaking context, nor would it make sense if it did. Time Warner has not alleged any specific facts to demonstrate that expanding the class of 12 GHz eligibles would negatively impact the effectiveness of the Commission's rules in preventing interference. As RCN discussed in its initial comments in this proceeding, the frequency coordination process and the commission's rules provide a methodology for avoiding harmful interference in the first instance, and then remedying it in the event it occurs.³⁰ The Commission should not expect potential licensees in the context of the rulemaking proceeding to prove that there would be no harmful interference when there are already rules in place to prevent interference based upon applications to operate specific proposed facilities.

Time Warner also applies the license application standards established in Section 78.15(b)³¹ of the CARS rules to all proponents of the Optel petition globally.³² This standard is intended for use in making case-by-case determinations as to whether an eligible CARS applicant should receive a license for a specific facility. It is inappropriate to apply this standard at the rulemaking stage, where the issue is who should be eligible to apply for licenses in the first instance, not whether a specific application should be granted. At this juncture, PCOs and OVS operators are simply

questionable value. Second, the very fact that the issue of must-carry is before Congress, and not the Commission, indicates that this issue is not only in the wrong proceeding, but is being brought before the wrong branch of government.

²⁹ Comments of Time Warner at 9.

³⁰ Comments of RCN at 11-12.

³¹ 47 C.F.R. § 78.15(b) (requiring certain CARS applicants to include in their applications a statement that they have investigated the possibility of using cable instead of microwave and explaining why they have chosen to use microwave facilities). This provision actually militates in favor of granting Optel's petition because it provides an additional mechanism for the Commission to use in determining whether there are suitable reasons why the applicants seek to use the 12 GHz band.

³² Comments of Time Warner at 14 (applying the standard contained in Section 78.15(b) of the Commission's Rules, 47 C.F.R. § 78.15(b)).

seeking to gain eligibility to apply for CARS licenses. They would fully expect to comply with all applicable Commission rules governing CARS at such time as they are permitted to apply for the licenses, including the rules cited by Time Warner.

Finally, Time Warner applies standards applicable to rule waiver requests in arguing that PCOs have not made the showings necessary to justify gaining access to the 12 GHz band.³³ Again, these waiver standards do not apply in the context of a rulemaking proceeding. It is well settled that in the context of a rulemaking, an administrative agency has wide latitude in making policy decisions within the parameters established by its governing legislation.³⁴ It need only have a reasonable basis for determining that the rules it adopts are rationally related to the purposes of the statute under which it is acting.³⁵ Thus, while the Commission must weigh the information it has accumulated in the record of this proceeding, there is no independent burden of proof or threshold of evidence apart from the Commission's reasonable judgement based upon the totality of the record before it.

³³ Comments of Time Warner at 16.

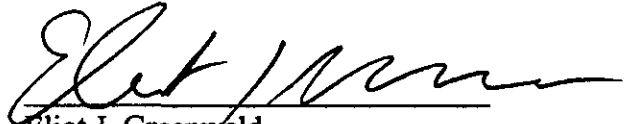
³⁴ *See, e.g., Chevron v. NRDC*, 476 U.S. 837, 844-45 (1984).

³⁵ *Id.* at 842-43.

III. CONCLUSION

Providers of private cable service and open video services have petitioned the Commission to grant them eligibility to the Cable Television Relay Service's 12 GHz band so that they might operate microwave backbone facilities that at least have parity with those operated by their competitors. The private cable operators seek only to have access on equal terms to current CARS licensees. RCN believes that there have been no issues raised in this proceeding that warrant the continued disparate treatment of private cable operators and open video system operators with respect to the 12 GHz band. Thus, RCN respectfully requests that the Commission amend its rules so that private cable operators and open video system operators will be eligible for licenses in the Cable Antennae Relay Service on terms equal to all other licensees in that service.

Respectfully Submitted,



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